IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

C.W.P. No.28 of 2007 alongwith CWPs No.437, 35, 31, 32 and 33 of 2007.

Judgment reserved on: 5.11.2007

Date of decision: 19th November, 2007.

CWP No.28 of 2007:
M/s.Vardhman Textiles Ltd. ....Petitioner

-Versus-

State of H.P. and others ….Respondents

CWP No.437 of 2007:
M/s.Shivalik Fibres Pvt. Ltd. ….Petitioner

Versus

State of H.P. and others ….Respondents

CWP No.35 of 2007:
GPI Textiles Ltd. ….Petitioner

Versus

State of H.P. and others ….Respondents

CWP No.31 of 2007:
M/s.V.M.T.Spinning Company Ltd. ….Petitioner

Versus

State of H.P. and others ….Respondents

CWP No.32 of 2007:
M/s.Winsome Textile Industries ….Petitioner

Versus

State of H.P. and others ….Respondents

CWP No.33 of 2007:
M/s.Chambal Fertilizers and Chemical Ltd. ….Petitioner

Versus

State of H.P. and others ….Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

The Hon'ble Mr.Justice V.K. Ahuja, Judge.

Whether approved for reporting? Yes

For the Petitioners: Mr.R.L.Sood, Senior Advocate with Mr.Vikas Rajput Counsel for the petitioner in CWPs No.28, 31, 32 & 33/2007.

Mr.Rakesh Thakur, counsel for petitioner in CWP No.437 of 2007.

Mr.Bimal Gupta, counsel for petitioner in CWP No.35 of 2007.

For Respondents: Mr.R.M.Bisht, Dy.A.G. with Mr.J.S.Guleria, Law Officer, for respondent-State.

Mr.Navlesh Verma, counsel for the respondent-The Agriculture Product Marketing Committee.

Mr.Anoop Rattan, counsel for HP State Agricultural Marketing Board.

Deepak Gupta, J.

By this judgment we are disposing of the aforesaid six writ petitions since common questions of law and fact arise for decision in these cases.

All the petitioners before us are Spinning Mills engaged in the production of cotton yarn. The petitioners in all the petitioners except in CWP No.437/2007 manufacture the cotton yarn from cotton. The petitioner in CWP No.437 of 2007 has alleged that it manufactures the cotton yarn out of cotton waste. All the petitioners have their manufacturing units in the State of Himachal Pradesh. They alleged that they obtain the raw material from outside the State of Himachal Pradesh. The petitioners except in CWP No.437 of 2007 purchase cotton bales from outside the State of Himachal Pradesh and these cotton bales are brought to their units within Himachal Pradesh and after going through a large number of processes the cotton yarn is manufactured. Petitioner in CWP No.437 of 2007 alleged that it is only buying cotton waste from

spinning mills situated outside the State of Himachal Pradesh and this cotton waste is then utilized for manufacturing of cotton yarn.

The State of Himachal Pradesh has enacted the Himachal Pradesh Agricultural and Horticulture produce Marketing (Development and Regulation) Act, 2005 (for short Act). Under the Act the H.P. State Agriculture Marketing Board has been constituted in the State of Himachal Pradesh and Marketing Committees have been constituted for different market areas. The Marketing Committee, Solan, Respondent No.2 issued notices to the petitioners directing them to get themselves registered under Section 40 of the aforesaid Act. The Petitioners replied that they do not fall within the ambit of Section 40 and are engaged in the manufacture of cotton yard and therefore they are not required to get themselves registered under the provisions of the Act. It is also urged that the Committees are not entitled to charge any market fee from the petitioners under the provisions of Section 44 of the Act. The Board respondent No.3 taken the view that the petitioners are liable to pay market fees to the Committee under Section 44 of the Act and it is this action of the respondents which is under challenge before us.

To appreciate the rival contentions of the parties it would be necessary to refer to the following provisions of the Act:

> "Section 2(a) "Agriculture produce" means all produce and commodities, whether process or unprocessed of agriculture, horticulture, apiculture, sericulture, livestock and products of livestock, fleeces (raw wool) and skins of animals, forest produce and fisheries as are specified in the SCHEDULE to this Act or declared by the

Government by notification under section 19 of this Act and also includes a mixture of two or more than two such products;

(e) “buyer” means a person, a firm, a company or a Cooperative Society or Government Agency, Public Undertaking/ Public Agency or Corporation, commission agent, who himself or on behalf of any other person or agent buy or agrees to buy agricultural produce in the notified market area;

(x) “market functionary” means a trader, a commission agent, buyer, hamal, processor, stockist and any other person as may be declared by the State Government, by notification, to be a market functionary;

(za) “marketing” means all activities involved in the flow of agricultural produce from the production point commencing from the stage of harvest till these reach the ultimate consumers viz, grading, processing, storage, transport, channels of distribution and all other functions involved in the process;

(zc) “notified agricultural produce” means any agricultural produce notified under section 19 of this Act;

(zg) “Processing” means any one or more of a series of treatments relating to powdering, crushing, decorticating, dehusking, parboiling, polishing, ginning, pressing, curing, cleaning, or any other manual, mechanical, chemical or physical treatments to which raw agricultural produce or its product is subjected to;

(zo)”Trader” means a person who in his normal course of business buys or sells any notified agricultural produce and includes a person engaged in processing of agricultural produce but does not include an agriculturist;

Section 27.(1)No person shall, except in accordance with the provisions of this Act or rules or bye laws made thereunder---

(i)use any place in the market area for the marketing of notified agricultural produce; and

(ii)operate in the market area as a market functionary.

Section 40.(1)Every person who, in respect of notified agricultural produce, desires to operate in the market area as a trader, commission agent, weighman, hamal, surveyor, ware houseman, contract farming sponsor, owner or occupier of the processing factory or any other market functionary, shall apply to the Secretary of the Committee for registration or renewal of registration in such manner and within such period as may be prescribed. The Secretary of the Committee shall be

> the authority to grant registration certificate with the prior approval of the Committee:
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> xxxxxxxxxxx
>
> Section 44: Every Committee shall levy, charge and collect market fee in the manner as may be prescribed on ad-valorem basis at the rate not exceeding two rupees for every one hundred rupees as may be fixed by the State Government,-
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> (i)on the sale or purchase of the notified agricultural produce, whether brought from within the State or from outside the State into the market area; and
>
> (ii)on the notified agricultural produce whether brought from within the State or from outside the State into the market area for processing."

The case of the petitioners in a nutshell is that they do not fall in any of the categories mentioned in Section 40(1) of the Act and therefore are not liable to get themselves registered under the Act. It is further alleged that the cotton bales/cotton waste which they are brought into the State is not notified agricultural produce and therefore no market fees can be levied on it in terms of Section 44 of the Act.

At the outset we may deal with the first contention raised by the petitioners that they are not brining in agricultural produce into the State of Himachal Pradesh. It is submitted that the cotton bales/cotton waste which they are brining into the State of Himachal Pradesh is not agricultural produce but is a manufactured items. These contentions have been made only to be rejected. Cotton bales are nothing but processed cotton. In fact in the schedule to the Act under item No.6 fibres cotton ginned and unginned are both included. Cotton bales are only ginned cotton. Therefore, it is definitely agricultural produce which is being brought into the State of Himachal Pradesh. In this behalf we may refer to a judgment of

the Apex Court in **Chimanlal Prem Chand vs. The State of Bombay, AIR 1960 SC 96,** wherein the Apex Court while dealing with the provisions of the Bombay Agricultural Produce Markets Act held as follows:

> "Cotton, ginned or unginned, continues to be cotton till it loses its identity by some chemical or industrial process. So long as the identity is not lost, the fact that it is pressed into bales or packed otherwise does not make it any the less cotton specified in the Schedule to the Act. In this view, the pressed cotton in bales is an agricultural produce as defined in S.2(1)(i) of the Act, and, therefore, a person doing business in the said produce without licence contravenes R.65 of the Rules."

As far as cotton waste is concerned the Apex Court in **Krishi Utpadan Mandi Samiti, Kampur and others vs. Ganga Dal Mill and Co. and others, (1984) 4 SCC 516,** in para 18 specifically set-aside the judgment of the Allahabad High Court holding that cotton waste is not agricultural produce. The Apex court held as follows:

> "In our opinion, the Court has strained the language to reach an unsustainable conclusion, holding that cotton waste is not the processed form of cotton but it is a by-product quite different form of cotton though containing cotton fibre which cannot be used as ordinary cotton. As its name indicates, cotton waste appears to be droppings, stripping and other waste product while ginning cotton. It cannot be said to be a by-product of cotton but it is cotton nonetheless minus the removed seed. In other words it is residue of ginned cotton. We therefore, find it difficult to agree with the view of the High Court that cotton waste is not comprehended in the item "cotton ginned and unginned".

It is thus clear that both cotton bales and cotton waste fall within the definition of cotton ginned and unginned and is agricultural produce within the meaning of the Act.

We now take up the question as to whether the petitioners are liable to get themselves registered in terms of Section 40 of the Act. Section 40 requires that a person who desires to operate in the

market area in respect of notified agricultural produce as a trader, commission agent, weighman, hamal, surveyor, ware houseman, contract farming sponsor, owner or occupier of the processing factory or any other market functionary is required to get himself registered in the manner prescribed. It is obvious that the petitioners do not fall under the categories of commission agent, weighman, hamal, surveyor, ware houseman, contract farming sponsor. The case of the respondents is that the petitioners fall in the other three categories i.e. trader, owner or occupier of the processing factory and market functionaries.

The definition of trader as given in section 2(zo) has been quoted above. This includes a person who during normal course of business buys or sells any notified agricultural produce and includes a person engaged in processing of agricultural produce. The question which will arise is whether the petitioners are engaged in processing of agricultural produce. Processing has been defined in Section 2(zg) and it includes one or more of a series of treatments relating to different types of processing and including ginning, pressing, curing, cleaning and any other manual, mechanical, chemical or physical treatments to which raw agricultural produce or its product is subjected to.

Market functionary has been defined to include various categories of persons as may be declared by the State Government by notification to be market functionaries. It is obvious that the definition of market functionary necessarily means that before a

person can be included in this definition there should be a notification by the State Government declaring such persons or category of persons to be market functionaries. No such notification has been brought to our notice.

The petitioners' case is that they are not processing units but are manufacturing units and therefore they do not fall either within the definition of trader or under the definition of owner or occupier of a processing factory.

Strong reliance is placed by the petitioners on the judgment of the Apex court in case **Orient Paper & Industries Ltd. vs. State of M.P. and others, (2006) 12 SCC 468.** The Apex Court was dealing with the M.P. Krishi Upaj Mandi Adhiniyam, 1972 which is similar to the H.P. Act. In that case the petitioners were using raw agricultural produce such as Bamboo, Wood, Dyes, Starch, Rosin, Talcum and several chemicals as raw material for production of paper. The manufacturing process consisting of reducing the bamboo and wood pieces into pulp to which chemicals were added at a subsequent stage. Section 19 of the MP Act is virtually identical to Section 44 of the H.P. Act. The Apex Court held that the petitioners before it were manufacturing paper and not processing the agricultural produce and held as follows:

> "16.Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing

at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity; but it is only when the change or a series of changes take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operation. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture.

17.”Manufacture” is a transformation of an article, which is commercially different from the one, which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. The essential point thus is that in manufacture something is brought into existence, which is different from that, which originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article.

18.The prevalent and generally accepted test to ascertain that there is “manufacture” is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic distinction between “processing and manufacture”, results in an oversimplification of both and tends to blur their interdependence.

19.To put it differently, the test to determine whether a particular activity amounts to “manufacture” or not is: Do new and different goods emerge having distinctive name, use and character? The moment there is transformation into a new commodity commercially known as a distinct

> and separate commodity having its own character, use and name, whether it be the result of one process or several processes "manufacture" takes place and liability to duty is attracted. Etymologically the word "manufacture" properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view is a question depending upon the facts and circumstances of the case."

The Court allowed the appeals filed by the Industries and held that since the appellants before it were manufacturers and not processors the market fees could not be levied.

In **Edward Keventer Pvt.Ltd. vs. Bihar State Agricultural Marketing Board and others, (2000) 6 SCC 264,** the appellant was a Company engaged in manufacturing fruit drinks under the name of Frooti and Appy. The Court held that the agricultural produce which is covered under the terms of the Bihar Act has to be specified in the schedule. The Court found that in the schedule under the caption "fruits", mango and apple had been specified as agricultural produce. Under caption "cereals" wheat was specified at item No.3 and wheat atta, sujji, maida etc. had specifically been specified as items 14, 15 & 16. Similarly milk had been specified as item No.19 and butter, ghee, cream, chena and khoya which were milk products had been separately specified. The Apex Court held that this shows that even if the basic ingredients might be the same but the end product is a different commodity then it has to be treated as a separate item. If the product looses its initial identify then the

end product will not fall under the first category and it would amount to manufacture. The Court held that the petitioner was not liable to pay market fees.

On the other hand Sh.Navlesh Verma, learned counsel appearing for the Marketing Board has contended that processing is an integral part of manufacture and the plain reading of the words of the Act makes it clear that a person engaged in processing of notified agricultural produce is liable to get himself registered and when such produce is brought into the State from outside for processing the Committees is entitled to levy fee on it.

He has placed reliance upon the judgment of the Apex Court in **Park Leather Industry (p) Ltd. and another vs. State of U.P. and others, (2001)3 SCC 135.** In that case hides and skins were included in the agricultural produce. The appellant before the Apex court was engaged in the business of preparing tanned and finished leather from hides and skins. The case set up before the Apex Court was that the appellant was engaged in the manufacturing of new commodity i.e. tanned leather which was not derived by processing hides and skins and was a commodity entirely different from hide and skin. The Apex Court held that hides and skins would include leather. Reliance was also placed on the Hindi version of the Act wherein as against the hides and skins the terms used were “khal and chamra”. The Court held that Hindi version was more authentic and chamra included leather.

Reliance has also been placed by the respondents on another decision of the Apex court in **G.Giridhar Prabhu and others vs. Agricultural Produce Market Committee, (2001) 3 SCC 405,** wherein the person concerned was purchasing raw cashew nuts and then extracting cashew kernels allegedly by means of processing. It was held that it was a trader within the meaning of Karnataka Agricultural Produce Marketing (Regulation) Act, 1966. This judgment is not applicable in the facts of the present case since under the Karnataka Act the word 'trader' included a person who buys notified agricultural produce for the purpose of manufacturing. Even the word 'importer' in the Karnataka Act has been defined to include a person who imports notified agricultural produce for the purpose of manufacturing.

The provisions of the H.P. Agricultural Produce Markets Act, 1969 which was repealed by the Act now in consideration were considered by the Apex Court in **Himachal Pradesh Marketing Board and others vs. Shankar Trading Co. Pvt.Ltd. and others, (1997) 2 SCC 496.** In that case though katha was a distinct and separate product derived from the agricultural produce (Khair wood), the Court held that even katha was included since the State had included katha in the schedule to the Act. It is nobody's case that cotton yard has been included in the Act. This judgment, therefore, does not help the respondent. Even under the present Act katha is included. Katha is not raw agricultural produce but it is the end product of a raw agricultural produce, namely, khair wood. The

State has included it in the schedule and therefore it would be agricultural produce within the meaning of the Act.

Reliance has been placed by Sh.Navlesh Verma on a Division Bench judgment of the Punjab and Haryana High Court rendered in **M/s.Bindra Feed Mills vs. State of Haryana and others, 1994 PLJ 188.** However, before we refer to this judgment it would be apposite to mention that the Punjab Agricultural Produce Markets Act as initially enacted was considered by a Division Bench of the Punjab and Haryana High Court in **Parkash Woollen Industries Panipat vs. The State of Haryana and others, 1980 PLJ 54.** The Court held that a dealer who brings agricultural produce for the purpose of manufacturing is not liable to pay market fees under the provisions of the Act. The Court held that giving the ordinary meaning to the word "processing", there was distinction between processing and manufacture. The Court held that the processing means 'such treating of an agricultural commodity so as to make it consumable while the commodity remaining substantially the same' while 'manufacturing' envisages turning of original commodity into a different commodity with different use and marketable character thereof being different and distinct from that of the original agricultural commodity. With a view to over come this judgment the legislature amended the definition of the word processing and the new definition included "manufacturing out of an agricultural produce". It is thus obvious that the legislature by definition created a legal fiction and included manufacturing in the definition of

processing. It is due to this definition that in **Bindra Mills case** the Punjab and Haryana High Court upheld the levy of market fee on goods brought for processing though the processing is an interim stage of manufacturing.

We cannot accept the contention of Sh.Navlesh Verma that cotton yarn is agricultural produce and is only produced by way of a process. As noted above certain Acts such as the Karnataka and Punjab Acts have included the word "manufacture" and "manufacturing" in their Acts and therefore even when agricultural produce is used for manufacturing a new product market fees may be levied. However, the legislature in the present case has purposely not used the words manufacture or manufacturing. The words process and processing have been used in the various definition clauses as well as the sections but the legislature in its wisdom chose not to use the words manufacture and manufacturing.

Every manufacture will necessarily include a series or number of processes. If agricultural produce is only processed and the resultant product is not very different then the resultant product may also be included in the definition of agricultural produce. However, as held by the Supreme Court in **Edward Keventer's** and **Orient Paper & Industry's** cases (supra) where the end product has a distinct and separate identity then it cannot be said that the notified agricultural produce is only being processed. It is by a series of processing being manufactured into something new; something having a totally different identity.

Petitioners have alleged which fact is not denied that when the cotton bales are brought into their spinning mills they are first taken to the blow room then carding is done thereafter combing takes place then the product goes through the various processes of being drawn through the draw frame, speed frame and ring frame and the resultant product which is cotton yarn is then wound and packed. It has been urged by Sh.Navlesh Verma that no chemical processes are involved unlike in the case of manufacture of paper from wood. However, this is not what is crucial to decide whether the processes amount to manufacture or just amount to processing. We have quoted in detail the judgment of the Apex Court giving the vital difference between the two. The main point of differention between processing and manufacturing is whether the end product has a totally different identity. In our considered view cotton yarn has a totally different identity from cotton. The series of process which are undertaken when combined together result in the manufacture of a totally different product, namely, cotton yarn.

In view of the above discussion we are of the considered view that the petitioners are manufacturing a non-agricultural product, namely, cotton yarn from agricultural produce and therefore do not fall within the ambit of the Act. We accordingly allow the writ petitions and hold that the petitioners are not liable to get themselves registered under Section 40 of the Act and they are not liable to pay market fees on the manufacture of cotton yarn. We consequently

quash the notices issued to the petitioners to get themselves registered and to pay market fees.

All the writ petitions are allowed in the aforesaid terms with no order as to costs.

(Deepak Gupta),
Judge

November 19, 2007.
PV

(V.K.Ahuja),
Judge